

# The principle of non-refoulement in international law

Lorcán Hyde\*

## I. Introduction

The images of thousands of people fleeing oppression and genocide during the Second World War and the atrocities committed by the National Socialist regime in Germany and across Europe were still fresh in the minds of the people across the globe when the “Ad hoc Committee on Statelessness and related problems” was appointed by the United Nations Economic and Social Council (ECOSOC) in August 1949. This committee was given the task to: “[...] (a.) Consider the desirability of preparing a revised and consolidated convention relating to the international status of refugees and stateless persons and, if they consider such a course desirable, draft the text of such a convention.”<sup>1</sup> It was comprised of delegates representing thirteen governments possessing “special competence in the field”.<sup>2</sup> The committee commenced negotiations in January 1950 and by July 1951 had drafted what would be known as the 1951 Convention on the Status of Refugees (hereinafter “Refugee Convention”). The principle of non-refoulement is included in Art. 33 of the Refugee Convention. Non-refoulement, derived from the French word “*refouler*”,<sup>3</sup> encompasses the states’ obligation not to expel or return a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.<sup>4</sup> It was perceived by the drafters as a moral imperative and recognised as the cornerstone of the Convention and indeed one of the core principles in international refugee law.<sup>5</sup> The importance bestowed by the

delegates upon this essential part of the Refugee Convention is further illustrated by the fact that it was not only one of the first issues discussed during the sessions, but also one of the most negotiated.<sup>6</sup>

However, even during the extensive negotiations and drafting of the Convention, it became evident that the states had very different ideas regarding scope and content of the obligations arising from non-refoulement.<sup>7</sup>

This article portrays the historical challenges of the *travaux préparatoires*, assesses the current legal standing of the principle within international law and finally highlights two aspects of the principle which have gained attention in the recent refugee crisis.

## II. Historical context and drafting

*Travaux préparatoires* can be a valuable source when trying to determine the object and purpose of a treaty, but also offer an interesting perspective on the development of conflict regarding interpretation and application.<sup>8</sup> While the nature of the principle of non-refoulement as a moral principle above all other cannot be disputed, the question concerning its historical and therefore ideological roots remains. The documents of the negotiations have seen an increase in attention in the recent years through a number of international court cases.<sup>9</sup> The drafting of the Refugee Convention was concluded in July 1951. The majority of the drafting of Art. 33 (then still referred to as Art. 28) took place at the very beginning of the negotiations. This emphasises the great importance placed upon the principle of non-refoulement.

Even in these early stages it became clear that non-refoulement and its scope were perceived very differently by the various nations involved in its drafting. On the one hand, there were the “Europeanist” countries such as France and Belgium with large numbers of refugees already in their territories. These states favoured a more regional approach regarding the status of refugees in general and non-refoulement in particular within the framework of the

\* Der Verfasser studiert Rechtswissenschaften an der LMU München und ist Mitglied der Redaktion von *rescriptum*.

1 Cf. ECOSOC Res.248 (IX), 1949.

2 Ibid.

3 *Collins Dictionary* French-English: “to force back, to turn away” (<http://www.collinsdictionary.com/dictionary/french-english/refouler>, accessed: 22.01.2016).

4 Cf. Convention Relating to the Status of Refugees, 189 UNTS, p. 137, Art. 33(1); earlier variations can be found in documents of the League of Nations, e.g. Art. 3 of the Convention Relating to the International Status of Refugees, 28 October 1933, LNTS Vol. CLIX No. 3663.

5 With regard to the principle’s importance, Denmark’s President Knud Larsen stated: “[...] Even if the work of the Committee resulted in the ratification by a number of countries of Art. 28 alone, it would have been worthwhile [...]” in: Takkenberg/Thabaz, *The collected travaux préparatoires of the 1951 Geneva Convention relating to the Status of*

*Refugees* 1989, I/III, p. 163.

6 Gilad Ben-Nun, *The British-Jewish Roots of non-refoulement and its true Meaning for the Drafters of 1951 [“Ben-Nun”]*, in: *Journal for Refugee Studies [“JRS”]*, Vol. 28, March 2014, p. 94.

7 Cf. Weis, *The Refugee Convention 1951, The Travaux Préparatoires analysed with a commentary* by Dr. Paul Weis, 1990, p. 233 et seqq.

8 Fitzmaurice, *Treaties* in: Max Planck Encyclopaedia of Public International Law [“MPEPIL”], §90.

9 *Inter alia Sale v. Haitian Centers Council Inc.*, 509 U.S. 155 (1993) [“*Sale v. Haitian Centers*”] Israeli Supreme Court Ruling No. 7146/12 *Najat Sarij Adam et al. against the Minister of Interior*, 16 September 2013; ECtHR, *Case of Hirsi Jamaa and Others v. Italy* No. 27765/09 [“*Hirsi Jamaa*”], Concurring Opinion of Judge Pinto de Albuquerque §58 et seqq.

Council of Europe rather than the United Nations.<sup>10</sup> On the other hand there were the “Universalist” states such as the United Kingdom and Israel, which strived for a universal approach to these issues. These two groups had contradicting opinions and standpoints regarding the definition of refugees as well as to the scope of non-refoulement.<sup>11</sup>

As the Israeli delegate Robinson wrote in a confidential report to Israel’s foreign minister Sharett: “[...] The French (and especially their delegate at the conference) are planning to drown the Convention so as to prove that this issue is not for the UN to solve, but rather that it really belongs to the “Council of Europe” [...]”<sup>12</sup> This example illustrates the diverse and contradicting standpoints which surrounded the issue of refugee law and the Refugee Convention from the very start and have shaped the understanding of its content throughout the decades.<sup>13</sup>

### III. The principle of non-refoulement in international law

The definition of the principle of non-refoulement enshrined in Art. 33(1) of the Refugee Convention is the following:

“No Contracting State shall expel or return (“refouler”) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be threatened on account of his race, religion, nationality, membership of a particular social group or political opinion.”<sup>14</sup>

The following section examines the legal character of the principle of non-refoulement aside from its status as treaty law in Art. 33 of the Refugee Convention.<sup>15</sup>

#### 1. Non-refoulement as a part of customary international law

It is imperative to understand that non-refoulement may be either interpreted restrictively, limited to the application towards refugees pursuant to Art. 33(1) of the Refugee Convention, or in a broader sense within the more general context of human rights.<sup>16</sup> In the latter case the principle

also applies to individuals which do not fulfil the definition of a refugee set forth in Art. 1(F) of the Refugee Convention, such as persons facing extradition following criminal charges.<sup>17</sup> It is obvious, that in these instances the principle of non-refoulement is inextricably linked to the prohibition of torture.<sup>18</sup> Therefore state practice and *opinio juris* must be examined carefully when assessing the legal status of non-refoulement with regard to refugees only. In order to be considered a part of international custom, there must be sufficient evidence of substantial uniformity, consistency and generality of state practice, as well as an acceptance of this very practice as law (*opinio juris sive necessitatis*).<sup>19</sup>

The principle of non-refoulement is widely accepted within the international community by bodies such as the United Nations General Assembly,<sup>20</sup> as well as the United Nations High Commissioner for Refugees.<sup>21</sup> Although these are non-binding in character, the emergence of a customary rule can be deduced from the near universal participation in one or more treaty regimes referring to non-refoulement.<sup>22</sup> Concerning state practice, there has so far been no case of total disregard for the principle. Even the states not party to the Refugee Convention or its 1967 Protocol have confirmed their recognition of the principle, as enshrined in Art. 33 of the Refugee Convention.<sup>23</sup> It is therefore safe to assume that the state practice suffices, being virtually uniform in this regard. In summary, it can be said that non-refoulement has indeed reached the level of a customary rule of international law.

#### 2. Non-refoulement as *ius cogens*

According to Arts. 53 and 64 of the 1969 Vienna Convention on the Law of Treaties (hereinafter “VCLT”), a peremptory (or imperative) norm is accepted by the community of states as a norm from which no derogation is permit-

10 Rochefort, representative of France claimed that: “Only Europe is ripe for the treatment of the refugee problem on an international scale” (Conference of Plenipotentiaries on the Status of Refugees and Stateless Persons: Summary Record of the Nineteenth Meeting, 13 July 1951, A/CONF.2/SR.19).

11 Cf. Glynn, The Genesis and Development of Art. 1 of the 1951 Refugee Convention, JRS, Vol. 25, March 2011, p. 139.

12 Translation by Ben-Nun, p. 10.

13 This conflict was however resolved after the adoption of Arts. 1 and 2 of the 1967 Protocol to the Refugee Convention. It may still serve an example of the controversies surrounding the principle from the start.

14 Convention Relating to the Status of Refugees, 189 UNTS, p. 137, Art. 33(1).

15 Currently there are 148 member states to the Refugee Convention and its 1967 Protocol: Figures published by United Nations High Commissioner for Refugees (UNHCR), April 2015 (<http://www.unhcr.org/3b73b0d63.html>, accessed: 21.01.2016).

16 This distinction is made by: Lauterpacht/Bethlehem, Refugee Protection in International Law: UNHCR’s Global Consultations on International Protection, the scope and content of the principle of

non-refoulement: Opinion 2003, p. 87.

17 A notable application outside the context of refugees is the ECtHR, *Case of Soering v. the United Kingdom*, No.14038/88, 07 July 1989.

18 Lauterpacht/Bethlehem (n 16), p. 93; Marks/Clapham, International Human Rights Lexicon, 2005, p. 373.

19 Statute of the International Court of Justice, 1945, 15 UNCIO 355, Art. 38(I)(b) [“ICJ-Statute”]; Cf. *North Sea Continental Shelf* (Federal Republic of Germany/Netherlands; Federal Republic of Germany/Denmark), ICJ Reports 1969, (3) 43; *Case Concerning Military and Paramilitary Activities in and against Nicaragua* (Nicaragua v. United States of America), ICJ Reports 1986, (14) 109.

20 UNGA/RES/37/195, §2; UNGA/RES/48/116, §3; UNGA/RES/2312(XXII), Art. 3.

21 Sanremo Declaration on the Principle of non-refoulement (2001): The International Institute of Humanitarian Law, along with the United Nations High Commissioner for Refugees, issued this statement on the occasion of the 50<sup>th</sup> anniversary of the 1951 Refugee Convention.

22 Lauterpacht/Bethlehem (n 16), p. 147.

23 UNHCR, The Principle of Non-Refoulement as a Norm of Customary International Law. Response to the Questions Posed to UNHCR by the Federal Constitutional Court of the Federal Republic of Germany in Cases 2 BvR 1938/93, 2 BvR 1953/93, 2 BvR 1954/93, 31 January 1994, §6.

ted.<sup>24</sup> They are of high importance, as they are considered so essential for the international system that deviation or a breach could question the international legal system itself.<sup>25</sup> It is questionable whether non-refoulement in all its aspects has reached this level of importance. In times in which mass migration and high numbers of refugees, as well as frequent use of the national security exception in Art. 33(2) of the Refugee Convention occur, an acceptance of non-refoulement as *ius cogens* could have a strong impact.<sup>26</sup> When accepting non-refoulement as international custom, one must still investigate whether the state practice is also based on the belief that the states are bound by *ius cogens* to do so.

The first mention of non-refoulement as a peremptory norm of international law was by the UN High Commissioner on Refugee's Executive Committee (hereinafter "UNHCR EXCOM") in 1982. It stated that "the principle of non-refoulement [is] progressively acquiring the character of a peremptory rule of international law".<sup>27</sup> The 1984 Cartagena Declaration went a step further and declared non-refoulement with regard to refugees to be *ius cogens*.<sup>28</sup> In 1996, the UNHCR Executive Committee finally assessed that non-refoulement had become a peremptory norm of international law as it "does not permit derogation".<sup>29</sup>

There are, however, severe doubts regarding these assessments apart from the fact that none of the other international bodies have confirmed the UNHCR EXCOM's findings. If non-refoulement were *ius cogens*, exceptions and deviations therefrom would likely not be considered. In the past, especially the exception enshrined in Art. 33(2) of the Refugee Convention regarding national security has been used to "balance interests" of the receiving state.<sup>30</sup> A tendency to interpret Art. 33(2) less restrictively in recent years and thus increasing the relevance of this exception to the non-refoulement principle points towards a development away from *ius cogens*.<sup>31</sup> In conclusion, the arguments in favour of non-refoulement having reached the level of a peremptory norm of international law in its entirety are not convincing.

24 Frowein, *Ius Cogens*, MPEPIL, §1; see also *Case Concerning The Barcelona Traction, Light and Power Company, Limited* (Belgium v. Spain) Second Phase, ICJ Reports 1970 (3) 32; BVerfGE 18, 441 (446) – AG in Zürich.

25 Allain, *The Jus Cogens Nature of non-refoulement*, in: *International Journal of Refugee Law* ["IJRL"], Vol. 13, No. 4, 2001, p. 534.

26 Ibid.

27 UNHCR EXCOM Conclusion No. 25 (XXXIII), 20 October 1982.

28 Cartagena Declaration on Refugees, adopted by the Colloquium on the International Protection of Refugees in South America, 1984, §5.

29 UNHCR EXCOM Conclusion No. 79 (XLVII), 11 October 1996.

30 A prominent example is the Canadian Supreme Court's 2002 *Suresh* decision (*Suresh v. Canada* (Minister of Citizenship and Immigration), [2002] 1 S.C.R. 3, 2002 SCC 1) in which the Court argued that refoulement may occur, if there is proof of a serious threat to national security.

31 Examples include: UNSC S/Res/1373 (2001); or UNSC S7Res/668 (1991) which described Kurdish refugees as a threat to the security of the region and in practice lead to an acceptance of refoulement (assessment by *Goodwin-Gill*, *The Refugee in International Law*, 2<sup>nd</sup> ed. 1996, p. 289).

#### IV. Content and scope of non-refoulement

As mentioned above, there have been varying perceptions concerning to which extent non-refoulement creates obligations for states. Some issues are still debated today, notably the application to individuals that do not hold the status of a refugee,<sup>32</sup> questions concerning the "refoulement" to third countries,<sup>33</sup> as well as the specific nature of the faced threat.<sup>34</sup> This article will focus on two aspects relating to non-refoulement which have gained significance in the current refugee crisis in Europe and the Middle East. The first of which is the debate concerning the extraterritorial application of non-refoulement, particularly regarding the interception of vessels on the high seas. Secondly the issue of how a mass influx situation such as the one experienced in the recent months affects the states obligations deriving from non-refoulement.

##### 1. Extraterritorial Application

Whilst it is widely acknowledged that non-refoulement does not grant an individual a right to asylum,<sup>35</sup> the question whether or not it may encompass a right to access a state's territory in order to, e.g., evaluate the legitimacy of his refugee status is highly topical.<sup>36</sup> There are many examples of states actively preventing individuals seeking protection from entering their territory, or even forcing individuals to return to the state from which they departed. The following segment examines the issue of vessels intercepted at sea and compares case law of the US Supreme Court to that of the ECtHR.

##### a) *The U.S. Supreme Court decision Sale v. Haitian Centers Council, Inc.*

A prominent example of denial of access to a state's territory was the United States practice of forcing vessels with Haitian refugees to not enter U.S. territorial waters.<sup>37</sup> After numerous documented cases of these refugees falling victim to human rights abuses following their forced return to Haiti, the issue was ruled upon by the US Supreme Court on 2 March 1993. The Court's decision was passed in June of that year with an 8-1 majority. The Court found that non-refoulement did not limit the President's right to order the Coast Guard to repatriate undocumented aliens intercepted on the high seas.<sup>38</sup> This finding was mainly based upon two arguments.

32 UNGA/RES/52/103, 09 February 1998, §5.

33 ECtHR *MSS v. Belgium and Greece*, No. 30696/09, 21 January 2011; see also: *Uhsler*, *rescriptum* 2016, 7 (8).

34 UNHCR EXCOM Conclusion No. 15 (XXVIII), 1979 §66.

35 *Gil-Bazo*, *Refugee Protection under International Human Rights Law: From Non-Refoulement to Residence and Citizenship*, in: *Oxford Refugee Survey Quarterly*, 05 January 2015, p. 12.

36 *Hailbronner/Gogolin*, *Territorial Asylum*, MPEPIL, §33.

37 *Rother*, *Policy on Haitian Refugees Blurs into Political Transition*, published in *The New York Times* on 24 November 1992 (<http://www.nytimes.com/1992/11/24/us/policy-on-haitian-refugees-blurs-in-political-transition.html>, accessed: 8 January 2016).

38 *Sale v. Haitian Centers*.

Firstly, the Court claimed that extraterritorial application of Art. 33(1) would create an anomaly. Only Art. 33(2) contains a direct reference to the country. “Dangerous aliens on the high seas would be entitled to the benefits of 33(1) while those that reside in the country that sought to expel them would not.”<sup>39</sup>

Secondly, the Court examined the meaning of the words “to expel” and “to return”, also referencing the French “*refouler*”. It concluded that “*refouler*” has a defensive connotation and thus cannot be interpreted to encompass the act of transporting individuals to a destination, but rather refers to the act of repelling them at the border.<sup>40</sup>

Lastly, the Court even referenced the Refugee Convention’s *travaux préparatoires*. By stating that even if it was the drafters’ intention to prevent a state from forcefully returning fleeing individuals to the territory they fled and the practice was therefore in direct violation of the article’s “spirit”, this would not give rise to an obligation to apply non-refoulement extraterritorially or beyond its general humanitarian intent.<sup>41</sup>

#### *b) Assessment of the Supreme Court’s ruling*

The Court’s decision was opposed by a large portion of the international community.<sup>42</sup> There are a number of compelling reasons indicating that non-refoulement indeed does have extraterritorial applicability.

At first it should be noted that Art. 1(3) of the 1967 Protocol to the Convention clarifies that its provisions should be applied “without geographic limitation”.<sup>43</sup> Whilst this alone cannot suffice to prove that this is also the case for the provisions of the 1951 Refugee Convention, it is indicative of the drafter’s intention that the Refugee Convention and generally International Refugee Law should not be subject to (geographical) limitations.<sup>44</sup>

In addition, there is no clause included in Art. 33(1) of the Refugee Convention limiting its applicability in any way. Indeed when undertaking a textual assessment, it becomes evident that certain provisions within the Refugee Convention do contain limitations.<sup>45</sup> As Art. 33 explicitly does not contain such a clause, *e contrario*, it cannot reasonably be assumed to be limited geographically or otherwise.<sup>46</sup>

Following a more teleological reasoning, a restrictive interpretation of the non-refoulement principle would directly contravene the Refugee Convention’s object and purpose to “assure refugees the widest possible exercise of funda-

mental rights and freedoms”.<sup>47</sup> A limitation of obligations to a state’s territory would defy this sentiment so fundamental to refugee and indeed human rights law in general. Moreover, the interpretation of the Refugee Convention must be in line with the general developments in the field of human rights, which point towards a dynamic interpretation and an increasing recognition of extraterritorial application of human rights.<sup>48</sup>

Lastly, it is generally agreed that states must be held responsible for conduct in relation to persons subject to or within their jurisdiction.<sup>49</sup> For a certain conduct to be attributable to a state, it is not decisive whether or not the act took place on the states territory but whether or not the state exercised jurisdiction and thus was in effective control. It cannot be denied that a vessel being compelled to turn around or indeed being actively “escorted” to its original port is under effective control and therefore the jurisdiction of the acting state. This argument has been brought forth in numerous internationally relevant cases.<sup>50</sup> Highly regarded scholars such as Sir Elihu Lauterpacht also very convincingly supported this notion.<sup>51</sup> Following this reasoning, the principle of non-refoulement must apply to the conduct of states and state officials anywhere, also on the high seas.<sup>52</sup>

For the forgoing reasons and against limited state practice pointing to the contrary,<sup>53</sup> it is evident that the obligations arising from the principle of non-refoulement must be applicable extraterritorially.

#### *c) Case law of the ECtHR*

Recently, the issue of interception of refugees at sea has again become highly relevant throughout the world and especially in Europe.<sup>54</sup> Within the European context, extraterritorial application specifically regarding the interception of vessels at sea has been covered in the case law of the ECtHR.

The ECtHR has firmly established the above mentioned notion that acts undertaken by states outside of their territory but under their effective control fall under said states jurisdiction as early as its *Loizidou v. Turkey* findings.<sup>55</sup>

39 Ibid, p. 179.

40 Ibid, p. 182.

41 Ibid, p. 183.

42 Notably also: the Decision of the Inter-American Commission on Human Rights, *Haitian Centres Council, Inc. v. United States*, Report No. 28/93, Case 10.675, §149 et seqq.

43 Protocol Relating to the Status of Refugees, 606 UNTS 267, Art. 1(3).

44 *Lauterpacht/Bethlehem* (n 16), p. 84.

45 Notably Arts. 4, 15, 18 of the Refugee Convention.

46 Opinion expressed by Justice Blackmun in his dissenting opinion to the Supreme Court’s decision: *Sale v. Haitian Centers*, §193.

47 Refugee Convention, Preamble, Clause 2.

48 *Fischer-Lescano/Löhr/Tohidipur*, Border Controls at Sea: Requirements under International Human Rights and Refugee Law, IJRL (2009) p. 269.

49 This formula and variations thereof can be found in a number of human rights agreements, such as Art. 2(1) ICCPR; see also: *Crawford*, *Brownlie’s Principles of Public International Law*, 8<sup>th</sup> ed., 2012, p. 540.

50 Cf. ECtHR, *Loizidou v. Turkey* (Preliminary Objections), 23 February 1995, Series A, No. 310, 103 ILR 622; Communication No. 52/1979, *Lopez Burgos v. Uruguay*.

51 *Lauterpacht/Bethlehem* (n 16), p. 110.

52 Ibid, p. 111.

53 USA: *Sale v. Haitian Centers*, §180; Germany: BMI, Effektiver Schutz für Flüchtlinge, wirkungsvolle Bekämpfung illegaler Migration, press release September 2005.

54 Migrant crisis, *BBC Europe*, 02 November 2015 (<http://www.bbc.com/news/world-europe-34700104>, last accessed: 22 February 2016).

55 ECtHR, *Loizidou v. Turkey* (n 50), §62–3. But also: *Medvedyev and Others v. France*, 29 March 2010, No.3394/03 §59; *Al-Skeini and Others v. UK*, 7 July 2011, No.55721/07, §61.

This notion was finally applied to the case of non-refoulement of refugees in the Mediterranean in the *Hirsi Jamaa and Others v. Italy* case. Eritrean and Somali nationals seeking refuge in Europe were intercepted by the Italian coast guard and returned to Libya, where the boat had embarked.<sup>56</sup> Italy was found to have exercised de facto as well as de jure control over the individuals while returning them to Libya and therefore exercised jurisdiction in accordance with Art. 1 ECHR.<sup>57</sup> With regard to the prohibition of torture Art. 3, the Court relieved the applicants of the burden of proof to a threat thereof.<sup>58</sup> Instead it focussed on Italy's obligation to proactively undertake the necessary investigations with regard to possible threats to the individuals.<sup>59</sup> This shift is in line with the understanding of non-refoulement as an absolute right.<sup>60</sup> Relying on independent sources, the Court found that the situation in Libya, which was not a state party to the Refugee Convention, had indeed posed a threat to the applicants amounting to Art. 3 ECHR.<sup>61</sup>

The comparison between the Supreme Court decision examined above and the ECtHR's case law highlighted in this section indicates an inherently differing assessment of the principle of non-refoulement and states' obligations arising therefrom.<sup>62</sup>

## 2. Mass influx

A mass influx situation is the combination of a sizable increase in refugees and migrants claiming protection and the suddenness of this occurrence.<sup>63</sup> In such a situation states are faced with difficulties regarding the requirement to focus on each individual's circumstances as a constant precedent.<sup>64</sup> Aside from leaving the persons seeking protection in an unfortunate legal limbo, the resources required in these situations may lead to a deterioration of the situation for these individuals in the host country. This leads some to call for an official derogation clause to Art. 33(1) of the Refugee Convention in the case of such an emergency.<sup>65</sup> On the other hand, until such a clause has been included, the wording of Art. 33(1), as well as the rest of the Refugee Convention offer no hint as to any exception of non-refoulement.

Indeed the UNHCR EXCOM has affirmed the impor-

ance of non-refoulement, especially in mass influx situations, as these are often clear indicators for a serious threat to the individuals seeking protection in their state of origin.<sup>66</sup>

This does not mean that receiving states must risk a crisis for its own population by exhausting its resources in order to comply with non-refoulement.

The solution however cannot be a detracting of non-refoulement, which is of the highest relevance in precisely such situations. Rather an increased cooperation between member states and assistance to states receiving high numbers of refugees in areas such as humanitarian aid and administration of the proceedings seems to be a viable option. In cases in which a receiving state is unable to completely fulfil its obligations regarding non-refoulement, it must at least accept these individuals on a temporary basis and provide essential services.<sup>67</sup>

## V. Conclusion

With regard to the principle's legal standing, there is overwhelming evidence of it being an integral part of customary international law. However, the claim that non-refoulement may be a peremptory norm of international law remains unconvincing. The fact that the first claim to these ends was made in 1982 and over 30 years later it still has not manifested itself to form *ius cogens* speaks for itself.

The highlighted issues regarding the principle's scope and content may serve as examples of differing interpretations within the international community in this regard. Whilst the specific controversies have changed since the times of its *travaux préparatoires*, non-refoulement remains one of the more contended parts of the Refugee Convention.

With far-right policies gaining influence throughout Europe amidst a high surge of refugees leaving ruined cities and countries in the Middle East, the principle of non-refoulement sees itself at risk of being compromised. In these circumstances it is important to be able to put the developments into perspective and understand the plight of the many thousands of people forced to set out from their home states in the face of persecution and torture in search for a safe life. Be it in 1920 from Russia and Armenia, in 1936 from Germany or in 2015 from Syria and Iraq.

56 ECtHR, *Case of Hirsi Jamaa and others v. Italy* No. 27765/09, §9 et seqq.

57 Ibid, §77 et seqq.

58 Similar notion in: ECtHR, *M.S.S. v. Belgium and Greece* No.30696/09, 21 January 2011, §14.

59 Ibid, §133.

60 *Moreno-Lax*, *Hirsi Jamaa and others v. Italy or the Strasbourg Court vs Extraterritorial migration Control?*, in: *Human Rights Law Review* 2012, p. 574 (582).

61 ECtHR, *Case of Hirsi Jamaa and others v. Italy* (n 56), §151.

62 See *Uhsler*, *rescriptum* 2016, 7 ff. for details on the ECtHR's case law relating to Art. 3 ECHR with regard to refugees.

63 Cf. Analytical Report of the Secretary-General on Internally Displaced Persons UN.Doc/E/CN.4/1992/23 §17.

64 *Lauterpacht/Bethlehem* (n 16), p. 119.

65 *Duriex/McAdam*, *Non-Refoulement through Time: The Case for a Derogation Clause to the Refugee Convention in Mass Influx Emergencies*, *IJRL* 2004, p. 19.

66 UNHCR EXCOM Conclusion No. 22 (XXXII), 21 October 1981.

67 A view that was reaffirmed in the light of the Yugoslav crisis: UNHCR EXCOM Conclusion No. 74 (XLV), 07 October 1994, lit. R.